

APPEAL NO. 051195
FILED JULY 6, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 25, 2005. The issue before the hearing officer was whether the respondent (claimant) had disability from November 23, 2004, to the date of the CCH. The hearing officer determined that the claimant had disability beginning on November 23, 2004, and continuing through the date of the hearing.

The appellant (carrier) appealed, contending that the hearing officer erred in refusing to add additional issues regarding whether the claimant was entitled to change treating doctors from (Dr. B) to (Dr. C) and an issue on whether the compensable injury included "lumbar radiculopathy, lumbar IVD/HNP, and lumbar myalgia/myositis" (referred to as the claimed conditions). The carrier also appeals the disability determination. The claimant responds, contending that the additional "issues were not discussed at the benefit review conference [(BRC)]. . . [and] were not addressed by the benefit review officer [BRO]." The claimant also contends that the requested issues "are spurious" and urges affirmance.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed that the claimant sought treatment at an employer's clinic and was eventually referred to Dr. B. Dr. B in a report dated April 26, 2004, referenced x-rays and diagnosed "Degenerative disc disease between L4-5 and L5-S1." An MRI performed on May 7, 2004, showed degenerative facet arthrosis at L4-5 and L5-S1 and a broad based posterior disk protrusion at L5-S1. The claimant was treated with muscle relaxants, physical therapy and epidural steroid injections. Dr. B released the claimant to return to work without restrictions on August 3, 2004. The claimant did return to work, at presumably her preinjury wage, working at easier modified employment. The claimant testified that her back pain became progressively worse. The claimant sought to change treating doctors from Dr. B to Dr. C on November 12, 2004, approved by the Texas Workers' Compensation Commission (Commission) on November 22, 2004. Dr. C's initial report, dated November 23, 2004, diagnoses the claimed conditions and on a Work Status Report (TWCC-73) of that date takes the claimant off work. The claimant is eventually referred to a surgeon and has spinal surgery for a "[h]erniated nucleus pulposus L5-S1 with compressive radiculopathy" on April 4, 2005.

The carrier filed a Notice of Disputed Issue(s) and Refusal to Pay Benefits (PLN 11) dated December 14, 2004, disputing that Dr. C is the treating doctor. The carrier filed another PLN 11 dated January 12, 2005, disputing that the compensable injury extends to the claimed conditions. A BRC was held on March 1, 2005. The carrier

contends that the issues of change of treating doctor and extent of injury were discussed at the BRC. The claimant contends that these “issues were not discussed at the [BRC]. They were not addressed by the [BRC]. They were not timely raised.” The file contains a “Carrier’s Motion to Add Additional Issues” dated April 4, 2005, asserting that “multiple issues” were discussed at the BRC “which included whether the Claimant was entitled to change treating doctors from [Dr. B] to [Dr. C] along with whether the Claimant’s compensable injury extended to and included [the claimed conditions].” Attached to the Motion were copies of the PLN 11 forms. The carrier requested the issues be added pursuant to Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)). Rule 142.7(e) provides in pertinent part that a party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the BRC report, such request shall be sent to the Commission no later than 15 days before the hearing, and the hearing officer will allow such amendment only on a determination of good cause. At the CCH the carrier again moved to have the change of treating doctor and extent-of-injury issues added. The claimant objected and the hearing officer ruled that he “is not going to add the issues” but the parties were not precluded from raising those issues at a subsequent BRC. The hearing officer made no finding or comment regarding good cause, or lack thereof, to add the requested issues.

Basically the claimant says the issues were not discussed at the BRC and the carrier says they were and should have been listed as issues. The BRC report lists the carrier’s position on disability as follows:

Carrier’s Position: The claimant is not entitled to [temporary income benefits (TIBs)] because her first treating doctor, [Dr. B], released her to return to work full-duty and she worked full-duty. There is no basis to support her claim for payment of [TIBs]. Finally, the carrier stated that the MRI of the lumbar spine showed degenerative disk disease and it has nothing to do with the compensable injury.

It would appear that from this brief summary the disputed issues were discussed at the BRC and together with the previously filed PLN 11 forms indicate that the issues should have been added at the BRC. Rule 141.5(e) requires the BRO to identify any issues left unresolved. The BRC report of the carrier position would indicate that the carrier was alleging that Dr. B was the treating doctor and that the MRI identifying the claimed conditions “has nothing to do with the compensable injury.”

The carrier’s motion to add the additional issues was made in writing (and orally at the CCH), identified the disputes, gave a reason for the request and appears to have been filed with the Commission on April 5, 2005, more than 15 days before the CCH. The hearing officer made no reference to the carrier’s written motion and made no findings on the motion or indicates the basis of his ruling.

We hold that the additional issues were discussed at the BRC, based on the stated prior filed PLN 11 forms and carrier's position and that the hearing officer erred in refusing to add the issues. We reverse the hearing officer's determination on disability on the basis that, under the particular facts of this case where the claimant was taken off work November 23, 2004, due to the claimed conditions and those claimed conditions are being disputed, the extent of the compensable injury must be decided before disability can be determined. We remand the case for the inclusion of the disputed issues, and for the hearing officer to allow evidence and comment on those issues before reconsidering the disability issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge